United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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COURT OF APPEALS, DISTRICT OF COLUMBIA

APRIL TERM, 1928

557

No. 4783

Roy O. West

~~HUBERT WORK~~, AS SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, AS COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS

vs.

ERIC LYDERS, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 10, 1928

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A Supreme Court of the District of Columbia

ERIC LYDERS, plaintiff,
vs.
HUBERT WORK, AS SECRETARY OF THE INTERIOR, and William Spry, as Commissioner of the General Land Office, defendants. } In equity, No. 48087

UNITED STATES OF AMERICA,
District of Columbia, *ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of complaint for injunction*

Filed March 15, 1928

In the Supreme Court of the District of Columbia

Holding an Equity Court

ERIC LYDERS, plaintiff,
vs.
HUBERT WORK, AS SECRETARY OF THE INTERIOR, and William Spry, as Commissioner of the General Land Office, defendants. } In equity, No. 48087

To the Supreme Court of the District of Columbia, holding an Equity Court:

The bill of complaint of Eric Lyders, plaintiff herein, respectfully states as follows:

I. That he is a citizen of the United States and a resident of the city of San Francisco, in the State of California, and brings this suit in his own right.

II. The defendant, Hubert Work, is the Secretary of the Department of the Interior of the United States, and as such has charge of the administration of the laws of the United States relating to the public lands; and the defendant, William Spry, is the Commissioner of the General Land Office of the United States, the latter being one of the branches of said Department of the Interior, having immediate charge of the matter of the administration of
2 the public lands of the United States, said Commissioner acting therein under the direction, supervision and approval of the Secretary of the Interior; and that each said defendant is sued in his official capacity as such Secretary of the Interior and Commissioner of the General Land Office, respectively, as hereinafter set forth.

III. That by act of April 5, 1872 (17 Statutes at Large, page 649) for the relief of Thomas B. Valentine, assignee of Juan Miranda, it was provided in substance that the claim of the said Thomas B. Valentine to certain lands situate within the State of California

to refuse and decline to give force and effect to the plaintiff's rights to the aforesaid Whaler Island by virtue of his selection thereof as hereinabove set forth; that the defendants have refused and declined, and still refuse and decline to determine plaintiff's rights in and to the said Whaler Island, and are threatening to issue patent for the said Whaler Island, and unless enjoined by this Honorable Court from so doing, will doubtless issue patent for said Whaler Island to the County of Del Norte, California, in violation of plaintiff's rights as assignee of the said Thomas B. Valentine, and by virtue of his selection of said island hereinabove set forth.

IX. And plaintiff says that he has now completely exhausted his rights of appeal, review, and rehearing in said Department of the Interior, and in said General Land Office, in respect of his claim to the aforesaid Whaler Island, and that no further opportunity for hearing or review of the question aforesaid, or for the further assertion therein of his claim to said tract of land, is afforded by the regulations and rules of practice of said department, or by any law or act of Congress in such case made and provided; and that his only remaining remedy is by appropriate appeal to the courts for relief from the rulings aforesaid, and which rulings, as plaintiff is advised by counsel, and accordingly so avers, are erroneous in matter of law.

7 X. And plaintiff says that by his selection aforesaid he has done everything necessary and proper under the rules and regulations of the Department of the Interior to vest in him the equitable title to the aforesaid Whaler Island, and he is advised by counsel that he is entitled to perfect his said selection and receive a patent for the said Whaler Island, the aforesaid act of Congress of March 4, 1927, to the contrary notwithstanding; and plaintiff says that if the certain action hereinabove set forth be permitted to stand, he will suffer irreparable loss, damage, and injury, for which he has no adequate remedy at law, and is otherwise remediless except in equity.

Wherefore, the premises considered, plaintiff prays:

1. That the process of this court issue directed to the defendant, Hubert Work, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, requiring them and each of them to appear and make answer unto the foregoing bill of complaint.

2. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the court, a preliminary order may issue herein restraining and enjoining, *pendente lite*, the defendants, their successors in office, and each, every, and all persons claiming to act under their, or either of their, authority or control, from enforcing any or either of the certain rulings, holdings, and decisions mentioned and complained of in the foregoing bill of complaint, or from canceling or rejecting the selection so heretofore made by plaintiff of Whaler Island; and also enjoining and restraining the defendants, *pendente lite*, from issuing patent to the said Whaler Island to the county of Del Norte, California, or to anyone other than the plaintiff; and that all necessary orders and rules to show cause may be

8 issued as shall be consonant with equity.

3. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendant, commanding and requiring that each

of the certain rulings, holdings, and decisions be vacated and set aside, and that the rights of the plaintiff by virtue of his selection of Whaler Island be recognized, respected, and given their full legal force and effect, excluding from any and all consideration in connection with plaintiff's selection of the said Whaler Island the Executive orders of January 28, 1927, and February 12, 1927, and the act of Congress of March 4, 1927, referred to in the foregoing bill of complaint; and that the defendants and each of them may be enjoined from issuing and delivering patent to the said Whaler Island to Del Norte County, or to any person other than the plaintiff herein.

4. And that plaintiff may have all such other and further relief as to the court may seem proper, as the nature of his case may demand and require, and as may be agreeable to equity.

ERIC LYDERS, *Plaintiff.*

JUSTIN MORRILL CHAMBERLIN,
PEELLE, OGILBY & LESH,
C. F. R. OGILBY,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco:

9 Eric Lyders, being first duly sworn, on oath, deposes and says that he has read the foregoing bill of complaint by him subscribed, and that he knows the contents thereof; that the matters and things therein stated upon his personal knowledge are true, and those therein stated upon information and belief, he believes to be true.

ERIC LYDERS.

Subscribed and sworn to before me this 5th day of March, 1928.
[SEAL.] HENRIETTA HARPER, *Notary Public.*

10 EXHIBIT "A"

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 17, 1927.

Sacramento 017260 "K" JWB:

Scrip application held for rejection. Crescent City Harbor Commission to be advised.

REGISTER,
Sacramento, California.

SIR: January 6, 1927, Eric Lyders, 200 Bush Street, San Francisco, California, filed application for a tract of unsurveyed land, known as Whaler Island, situated about one mile E. 15° S., from Crescent City Lighthouse; described by metes and bounds and as being approximately in Sec. 33, T. 16 N., R. 1 W., H. M., containing 2.7 acres.

The application was accompanied by a photostat copy of certificate E–86, dated March 28, 1874, for 40 acres, issued to Thomas B. Valentine under the provisions of the act of April 5, 1872 (17 Stat.

649). The certificate is stamped "located and patented," and across the face appears an endorsement reading: "Located on Lot 8, Sec. 3, Tp. 37 N., R. 57 W., 4th P. M., Minnesota, containing 36.50 acres, by William S. Douglas, assignee, patented November 27, 1908, patent No. 31406." The copy is certified under date of December 6, 1926, as evidence of a further right of location under the decision in the case of F. W. McReynolds (31 L. D. 259).

The application was sworn to and contained allegations that the land is not mineral in character; that no portion is claimed for mining purposes under the local customs or rules of miners; "that the land is not occupied or improved by any Indian and is unoccupied and unappropriated by any person claiming the same other than myself."

11 The application was not accompanied by the filing fee of $1, but this was subsequently paid and applied January 27, 1927, receipt 2905172.

Proof of publication of notice has been received showing that the form of notice given in 36 L. D., 346, was changed by the register so that instead of designating a day certain and named in the notice, the notice was that affidavits of protest should be filed "on or before 30 days from the date of the first publication of this notice." The date of first publication as given in the newspaper was January 11; as posted on the land, January 9; and as posted in the district land office, January 6. The form prescribed leaves blanks for the register to insert in the notice a date that is certain, which "should be not later than 30 days after the beginning of publication and posting."

By Executive Order No. 4573, dated January 28, 1927, that unsurveyed land known as Whaler Island was withdrawn from settlement, sale, location, entry, or other forms of appropriation, subject to any valid existing rights in and to the same pending classification and in aid of legislation.

By Executive Order No. 4582, dated February 12, 1927, Whaler Island was withdrawn under authority contained in the act approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), in aid of legislation and in connection with the improvement of the harbor at Crescent City, California.

Prior thereto bills had been introduced in Congress to authorize the Secretary of the Interior to issue patent for Whaler Island to the county of Del Norte, California, for the purpose of a public wharf, and an act of Congress was approved March 4, 1927 (Private 530), for that purpose.

February 8, 1927, J. J. McNamara, as chairman of the Del Norte County Harbor Commission and on behalf of that commission,

12 filed in your office a protest against the scrip application, alleging, among other things:

First, That Whaler Island was appropriated by the United States Government for harbor improvement purposes on May 15, 1915, when Col. Thos. H. Reese, Corps of Engineers, U. S. A., approved a map forwarded with his report on the proposed improvement of Crescent City harbor (published in House Ex. Doc. 434, 64th Congress, 1st session); that such map shows a proposed jetty from Whaler Island to station O–OO; that Whaler Island was and is a part of the proposed improvement of the harbor; and that the island

was appropriated as a portion of such harbor improvement prior to the filing of the scrip.

Second, That Del Norte County has paid the sum of $245,000 towards the improvement of Crescent City harbor which embraces Whaler Island, and that the United States had expended the sum of $245,000 for the improvement of said project, and that the recent river and harbor bill contains an item for the purpose of continuing the improvement. Notice of this protest was not served on the scrip applicant by the protestant.

The river and harbor act approved July 18, 1918 (40 Stat. 904), authorized the improvement of Crescent City harbor in accordance with the report submitted in House Document 434, 64th Congress, 1st session, subject to the conditions set forth in said document, and required the contribution of the sum of $200,000 by local interests.

The report cited in the act includes the map referred to and filed with the protest.

The conditions precedent to the prosecution of the project were modified by river and harbor act September 22, 1922 (42 Stat. 1038), in accordance with the report submitted in Rivers and Harbors Committee Document No. 4, 67th Congress, 2nd session.

By the river and harbor act approved January 21, 1927 (Public 560, 69th Congress), the improvement of Crescent City harbor was authorized to be prosecuted under the direction of the Secre-
13 tary of War and supervision of the Chief of Engineers in accordance with the plan recommended in the report submitted in House Document 595, 69th Congress, 2nd session, and subject to the conditions set forth in that document.

The utilization of Whaler Island as terminus of a sand barrier in the event that sand movement refilled the dredged area in the harbor is referred to on page 28 of the report.

The scrip applicant has filed a protest against the issuance of a patent to the county of Del Norte, State of California, for Whaler Island, alleging that the act is in no sense a grant, but merely gives authority to dispose of the land in a manner not theretofore authorized.

Jeremiah Collins, on behalf of the scrip applicant, has filed protest, claiming that the rights of the applicant became vested at the time of the filing of the selection and cites the case of Payne vs. Central Pacific Railway Company (255 U. S. 228), and departmental decision of May 14, 1926, in the case of Edward F. Smith (51 L. D. 454); that the application of Mr. Lyders was on the same footing at the time of the withdrawal of the land from entry as was the application of Smith in the decision above cited.

The principle announced in the cases cited is not new and has been recognized in repeated decisions by the department and by the courts.

On the authority of the Yosemite Valley case (15 Wallace 77), it was held by the department in the case of Henry A. Bruns (15 L. D. 170), that the filing of Valentine scrip on unsurveyed land did not deprive Congress of the power to make other disposition of the land before it was offered for sale, nor did the United States by the act of April 5, 1872, supra, enter into any contract with the

locator or incur any obligation to anyone that unsurveyed land so filed on should ever be offered for sale.

On the other hand, in Payne vs. Central Pacific Railway Company (255 U. S. 228), the land was subject to sale and disposal at
14 the time the selection was filed. The land was surveyed when selected; the selection was admittedly valid when made and the court directed that the selection be disposed of on its merits unaffected by the withdrawal.

In the case of filing of Valentine scrip on unsurveyed land, it is necessary for the land to be surveyed, the plat filed, and an opportunity afforded prior settlers or those having any valid right to present their claims. It is also necessary for the scrip applicant to pay the location fee and adjust his scrip to the subdivisions of the survey as required by the act. The regulations provide that the Register may make the adjustment if the scrip applicant fails to do so, but such adjustments are clerical and are frequently erroneous, through lack of sufficient information or errors in the application.

The land is unsurveyed and instructions are necessary for the survey of the land in order that patent may issue. The official reports to Congress of which this department will take judicial notice, show that the inland was within the scope of the harbor improvement; that it has no value for agriculture, and no value except in connection with the harbor; that its value as the terminus for a wharf has been enhanced at the combined expense of the county and the United States.

The boundaries of the land districts in California as defined by Sec. 2256, U. S. R. S., run "along the ocean," and the plat of T. 16 N., R. 1 W., H. M., approved November 6, 1856, does not include any islands off the shore. The appropriation act of August 31, 1852 (10 Stat. 76, 91), directs the Coast Survey to survey Santa Cruz and other islands named therein, "according to such plan as may be devised by the Commissioner of the General Land Office so that said lands may be disposed of under the laws of the United States." The general jurisdiction of the Coast Survey to survey islands within 20 leagues of the coast is defined in Sec. 4681, U. S. R. S.

15 No special mode of disposal of other islands in the Pacific Ocean has been prescribed by Congress as a part of the public land laws. Congress has specifically authorized this island to be patented to the County of Del Norte, State of California, for the purposes stated, and such disposal is a continuation of the purposes for which the improvement of the harbor was undertaken at the expense of the Government in cooperation with the county. The conclusions reached make it unnecessary to determine whether the scrip filing could have been perfected in the absence of such disposal.

The application to file scrip thereon is rejected subject to the right of appeal to the Secretary of the Interior within 30 days from receipt of notice. The scrip will be returned for delivery to the persons entitled thereto. Serve notice and in due time report, transmitting evidence of service.

Very respectfully,

(Signed) THOS. HAVILL,
Assistant Commissioner.

16 EXHIBIT "B"

OCTOBER 3, 1927.

ERIC LYDERS:

Sacramento 017260 "K"

Application to locate scrip rejected. Affirmed.

Appeal from the General Land Office

This is an appeal by Eric Lyders from decision of the Commissioner of the General Land Office dated May 17, 1927, rejecting his application to locate Valentine scrip on an unsurveyed island, known as Whaler Island, containing approximately three acres, located in Crescent City Bay or Harbor, Del Norte County, California.

The scrip referred to was issued under authority of the act of April 5, 1872 (17 Stat. 649), which provided that Valentine or his legal representatives may select, and shall be allowed, patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, * * * and, if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys.

The application to locate said piece of scrip was filed in the local land office at Sacramento, California, January 6, 1927, accompanied by the evidence required by existing rules and regulations, showing that the land is unoccupied and nonmineral in character. The fee required in connection with the location was paid January 27, 1927, and proof of publication and posting of notice thereof was duly filed.

By Executive orders Nos. 4573 and 4582, dated January 28 and February 12, 1927, respectively, Whaler Island was withdrawn from all forms of disposal, subject to any valid existing rights in and to the same, under authority of the act approved June 25, 1910 (36 Stat. 847) as amended by the act of August 24, 1912 (37 Stat. 497), in aid of legislation and in connection with the improvement
17 of the harbor at Crescent City, California. Thereafter by act approved March 4, 1927 (Private, No. 530, 69th Congress, second session), Congress granted the island to the County of Del Norte. The act making the grant reads as follows:

That the Secretary of the Interior is hereby authorized to issue patent to the County of Del Norte, State of California, to Whaler Island, containing about three acres, in Crescent City Bay, Del Norte County, California, for purposes of a public wharf.

SEC. 2. That the Secretary of the Interior is hereby directed to take such action as may be necessary to carry out the purposes of this act.

In rejecting the scrip location the commissioner held in substance that the island was in legal effect appropriated to the uses of the Government for purposes of harbor improvement prior to the filing of the scrip, its utilization having been suggested or recommended in a report or plan submitted or proposed in 1915 by an Army engineer who had made an examination and survey as directed by Congress in one of its river and harbor acts. The commissioner further held that whether or not in legal contemplation the island was appropriated for harbor improvements prior to the filing of

appellant's scrip, it was the duty of the Land Department to obey the mandate of Congress in its disposition; that the act providing for the issuance of patent to Del Norte County was imperative in its terms and that administrative officers could not read a condition or exception into the act which it does not contain.

Appellant contends that the island was vacant and unappropriated public land at the time of his selection; that no officer of the Government had attempted to withdraw, reserve, or appropriate same prior thereto, and that he acquired vested rights in the property by virtue of his selection of which he could not be deprived by any subsequent Executive withdrawal or legislative action. Appellant relies upon the recent ruling of the department in the case of *Edward E. Smith et al.* (51 L. D. 454), wherein the principle announced by the Supreme Court in the case of Payne vs. Central Pacific Railway Company (255 U. S. 228), was applied.

18 In the consideration of this matter it is proper to observe that Whaler Island had never been taken possession of and occupied by the Government for any special purpose prior to appellant's scrip location, and it has never at any time been included or involved in any plan authorized or approved by Congress for the improvement of Crescent City Harbor. The first examination and survey of this harbor was made by Army engineers in 1867. Other examinations were made from time to time. See House Document No. 595, 69th Congress, second session, and numerous plans considered and recommended for its improvement without action by Congress until 1918. The Army engineer originally in charge of that district suggested a plan, including a breakwater extending from Battery Point in a southerly direction toward Round Rock or Fauntleroy Rock, and a jetty or sand barrier from Whaler Island to the high-water beach line, the entrance to be between Faumtleroy Rock or Round Rock and Whaler Island. Under a provision contained in the river and harbor act of July 18, 1918 (40 Stat. 904, 910), a project for the improvement of the harbor was authorized in accordance with the report and recommendation of the Chief of Engineers, United States Army, set forth in House Document No. 434, Sixty-fourth Congress, first session, and subject to the further condition that local interests contribute $200,000 to the cost of the work. The plan recommended and adopted authorized the construction of a breakwater 3,000 feet in length, extending from Battery Point in a southerly direction straight toward Round Rock. The construction of a jetty or sand barrier from Whaler Island to the high-water beach line was not authorized. The project was started in 1920 and continued under various contracts until July 20, 1925, when funds under the original estimate of $490,000 were exhausted and operations were suspended, 2,245 feet of breakwater having been completed.

19 Section 8 of the river and harbor act approved March 3, 1925 (43 Stat. 1186), directed further examination of said harbor and report pursuant thereto was submitted by the Secretary of War under date of December 18, 1926, House Document No. 595, supra, the Chief of Engineers recommending the completion of the existing project by extending the breakwater to its originally projected length, 3,000 feet. This recommendation was approved by

Congress and the work authorized by provision contained in the river and harbor act approved January 21, 1927 (44 Stat. 1010, 1014).

In disposing of this case it is unnecessary to pass upon the contention that appellant acquired vested rights in the island beyond the power of Congress to cut down or destroy. The act authorizing the issuance of patent to the county of Del Norte is mandatory and imperative and does not vest any discretionary power in the Secretary of the Interior as to whether the patent should or should not issue or as to whether Lyders's location should or should not be allowed. In directing the issuance of a patent, as it did, Congress acted with full knowledge of the claim asserted to the island by Lyders. The report (No. 2019) of the House Committee on the Public Lands accompanying H. R. 16555, identical with S. 5385, which became a law, reads in part as follows:

Whaler Island is composed entirely of rock, and has an area of about three acres. It serves in part as a breakwater to project the harbor, and its rock is suitable for use in jetty construction. It is located between the end of the jetty and the shore. The intervening waters between the island and the shore are of a shallow depth that permit the construction of a causeway from the island to the shore. Stone from the top of the island would be suitable for this purpose. This causeway would also serve as a sand barrier and a breakwater for the harbor.

The island extends to deep water on two sides. Local interests desire the island for the purposes of a public wharf. The bill does not authorize the transfer of an unrestricted title, but is subject to the limitation for public-wharf purposes. Under the laws of California a public wharf is subject to use by all commerce, and rates thereon are subject to regulation by a utility commission.

On the 11th day of January 1927, Eric Lyders, an attorney at San Francisco, filed in a California land office an application for the selection of said island as an assignee of the assigns of Thomas B. Valentine script. Subsequently this bill was filed, and thereafter the President made an order withdrawing this island from entry pending legislation by Congress as provided by law. Mr. Lyders claims that the filing of his application created in him a vested right to the island of which he can not be deprived by action of Congress.

This island, located in the harbor, should not be in private hands where it could be so managed as to interfere with and proper protection and development of the harbor, and with the best administration of the harbor facilities for the benefit of public commerce. Crescent City is a harbor through which it is anticipated very large*d* quantities of Government-owned timber from the forest reservations will eventually be shipped to market. Proper wharf facilities would serve this purpose. Its use as a protection to the harbor and for public purposes can be preserved by the conveyance authorized by this bill.

Del Norte County has paid $245,000 toward development of this harbor. Its moral claims to the island, to be used for the benefit of the public, are superior to those of an applicant, whose manifest purpose is speculative.

This island is unsurveyed public land, and manifestly the Government, notwithstanding the application, should retain the power to apply it to public purposes, such as a public wharf.

The equities are in favor of the public interest. The private claimant should not succeed in his application unless lawful reasons require it. The courts are open to protect the lawful right, if any, of the applicant, notwithstanding this action of Congress.

The report of the Secretary of War is as follows:

FEBRUARY 3, 1927.

Hon. N. J. SINNOTT,
Chairman Committee of the Public Lands,
House of Representatives, Washington, D. C.

DEAR MR. SINNOTT: I have the honor to reply to your letter of the 27th ultimo requesting report on House bill No. 16555, "Authorizing the Secretary of the Interior to issue patent to the county of Del Norte, State of California, to Whaler Island, in Crescent City Bay, Del Norte County, Calif., for purpose of a public wharf."

Whaler Island is located in Crescent City Harbor about 2,300 feet from the mainland, and has a rocky area of approximately five acres. It is understood to be unsurveyed public land under the control of the Department of the Interior. The island is considered by local interests an appropriate site for municipally owned wharves and terminals, and the bill authorizes its transfer to the county of Del Norte for public wharf purposes. Such transfer is not objectionable from the standpoint of the work of harbor improvement in charge of this department, and I am aware of no reason why the bill should not receive favorable consideration.

In the circumstances the claim asserted by Lyders can not be recognized as constituting any sufficient ground for declining to issue the patent applied for by the board of supervisors of Del Norte County, and without passing upon any question of superiority of right or title to the land as between the parties the action appealed from is affirmed.

(Signed) E. C. FINNEY,
First Assistant Secretary.

21 EXHIBIT "C"

DEPARTMENT OF THE INTERIOR,
Washington, November 10, 1927.
Sacramento 017260. "K."

ERIC LYDERS:

Motion for rehearing denied.

Motion for rehearing

Eric Lyders has filed a motion for rehearing with respect to his application, Sacramento 017260, to locate Valentine scrip on an unsurveyed island, known as Whaler Island, situated in Crescent City Bay, Del Norte County, California. The application was rejected by the department in a decision dated October 3, 1927.

The application in question was filed in the district land office at Sacramento, California, on January 6, 1927. Notice of the selection

was duly published, the date of the first publication being January 11, 1927. Within 30 days from that date the chairman of the Del Norte County Harbor Commission, on behalf of the commission and the people of the county of Del Norte, filed a protest against the allowance of the selection. While this protest was pending the island was withdrawn from all forms of disposal, subject to any valid existing rights in or to the same, by Executive orders Nos. 4573 and 4582, dated January 28 and February 12, 1927, respectively. On March 4, 1927, Congress passed the following act—which is published in 44 Statutes at Large, part 3, page 184—with respect to the island:

That the Secretary of the Interior is hereby authorized to issue patent to the county of Del Norte, State of California, to Whaler Island, containing about three acres, in Crescent City Bay, Del Norte County, California, for purposes of a public wharf.

SEC. 2. That the Secretary of the Interior is hereby directed to take such action as may be necessary to carry out the purposes of this act.

Thereafter Lyders's application 017260 was rejected by both
22 the commissioner and the department. The department said, in its decision of October 3, 1927, that the act authorizing the issue of a patent to the county of Del Norte is mandatory and imperative, and does not vest any discretionary power in the Secretary of the Interior as to whether patent should or should not issue, or as to whether Lyders's location should or should not be allowed.

The motion for rehearing is based upon three contentions which are in substances as follows:

First, that it is the duty of the Secretary to pass upon the validity of Lyders's selection; second, that in so doing nothing that happened subsequent to the date of his selection should be considered; and third, that the act of March 4, 1927, supra, does not grant Whaler Island to the county of Del Norte, and does not deprive the Secretary of his power nor relieve him of his duty to see that the island is disposed of in conformity with the proper public land laws, but merely confers upon him additional authority to dispose of the land in a manner not theretofore authorized by law.

While the petitioner's brief has been read with attention and all the cases cited therein have been examined, it would serve no purpose to follow his argument in detail, by reason of the plain fact that the Department of the Interior now has no jurisdiction, power, or authority to allow his application to acquire title to Whaler Island.

The public domain is the property of the United States, and it can be disposed of only in accordance with the laws of Congress. The Department of the Interior, which was itself created by Congress, has no inherent powers with respect to public lands. It has authority to dispose of those lands only because Congress has vested such authority in it, and in disposing of them it must act in the manner and for the purposes specified by statute.

23 In the instant case Congress, by the act of March 4, 1927, supra, has given a mandatory direction to the Secretary of the Interior to take such action as may be necessary to insure the issuance of a patent to the county of Del Norte, California, to Whaler

Island, for the purposes of a public wharf. Therefore, as the matter now stands, the Land Department has no power to dispose of Whaler Island in any other way.

The act of March 4, 1927, supra, was, with respect to Whaler Island, equivalent to a repeal of all of the then existing public land laws which otherwise might have controlled the disposition of the land it embraces; with the result that there is now no public land law under which Lyders can acquire title to that land.

These considerations are conclusive upon the Department of the Interior. The motion for rehearing accordingly is denied.

(Signed) E. C. FINNEY,
First Assistant Secretary.

24 *Motion to dismiss bill of complaint for injunction*

Filed March 22, 1928

* * * * * * *

Come the defendants, Hubert Work, as Secretary of the Interior, and William Spry, as Commissioner of the General Land Office, by their attorneys of record, responding to a Summons in Equity issued herein on March 15, 1928, and a Rule to Show Cause issued herein on the same day, and move the court to dismiss the bill of complaint, for the following reasons, viz:

1. The bill of complaint wholly fails to set up sufficient grounds to warrant the court in granting the relief sought or any relief. The bill shows on its face that the lands involved are unsurveyed; that the legal title thereto is now and at all times has been vested in the United States, and that Congress has directed defendants to issue to the County of Del Norte, State of California, a patent therefor for purposes of a public wharf; that the direction of Congress in the premises is mandatory, and obedience thereto by these defendants is not discretionary or dependent upon the nature or the extent of the title which might thereby be conveyed, or whether any title would pass by virtue thereof.

2. That the bill shows on its face that the authority conferred upon the Secretary of the Interior to issue such patent is without limitation or condition requiring him to ascertain and determine any questions of fact or of law; that the purpose of Congress is declared in the act to appropriate the said land to use as a public wharf, and the only act authorized being to issue such patent, the
25 direction of Congress that the Secretary of the Interior shall "take such action as may be necessary to carry out the purposes of this act," leaves these defendants without discretion in the premises.

3. That the bill shows on its face that these defendants, because of the said act of Congress of March 4, 1927, have never investigated, considered, or determined any questions of fact upon which the validity of the attempted location by plaintiff, as set out in his bill, depends, and have never finally determined whether but for the said act of Congress, the said land is subject to selection by plaintiff under the right asserted by him, and that to grant the relief asked would in effect be a determination by the court of the title to said land without the presence of the United States, and a determination

that the said County of Del Norte was without right, legal or equitable, in the premises, and without its presence before the court.

4. That the bill shows on its face that to grant the relief asked by plaintiff would require the court to ascertain and determine all questions of fact upon which the right of plaintiff to locate or select the land described in the manner alleged in the bill depends and would require the court in the first instance to exercise jurisdiction vested exclusively in the Secretary of the Interior.

5. That the bill shows on its face that plaintiff has a full, complete, and adequate remedy, in the event patent is erroneously issued by defendants to the said county of Del Norte, in a suit against such patentee wherein all questions of title may be adjudicated and determined and wherein all parties in interest may be brought before the court.

26 6. That the bill shows on its face that parties whose interests will be affected or determined by any decree entered herein in favor of plaintiff, have not been joined as parties and whose presence before the court is necessary and indispensable.

7. That the bill herein shows on its face that the court is without jurisdiction in the premises.

E. O. PATTERSON,
Solicitor, Department of the Interior,
O. H. GRAVES,
Assistant to the Solicitor,
Attorneys for Defendants.

Final decree awarding injunction

Filed April 30, 1928

* * * * * * *

This cause having come on to be heard on the motion of the defendants to dismiss the bill of complaint herein filed, and having been argued by counsel, and the Court having been fully advised in the premises, it is by the Court, this 30th day of April, 1928, adjudged and ordered that the motion to dismiss be and the same is hereby overruled; and, the defendants electing to stand on their motion to dismiss, upon further consideration thereof, it is, this 30th day of April, 1928, adjudged, ordered, and decreed that the defendants, as Secretary of the Interior and as Commissioner of the General Land Office, respectively, their successors in office, and all persons claiming to act under their authority and control, or the authority and control, of either of them, be and they are here-

27 by permanently restrained and enjoined from cancelling or rejecting plaintiff's location of a tract of unsurveyed land, known as Whaler Island, in the harbor of Crescent City, California, being approximately in Section 33, T. 16 N., R. 1 W., H. M. California, known in the General Land Office of the United States as Sacramento 017260, on account of or by reason of any order, ruling, holding, or decision, mentioned and complained of in the bill of complaint herein, and from issuing a patent to the said Whaler Island or any part thereof to the county of Del Norte, California, pending final

determination by the defendants of the rights of the plaintiff to the said island, as prayed in plaintiff's bill of complaint.

It is further adjudged, ordered, and decreed that the said defendants, their successors in office, and all persons acting under the authority or control of them, or either of them, in giving full legal force and effect to the plaintiff's said selection and location of said land and in disposing thereof, shall exclude from consideration the Executive orders of January 28, 1927, and February 12, 1927, and the act of Congress of March 4, 1927, referred to in the plaintiff's bill of complaint, all as prayed therein.

And it is further adjudged, ordered, and decreed that the plaintiff may have and recover his costs herein of the defendants, the same to be taxed by the clerk of the court.

JENNINGS BAILEY, *Justice.*

And now on the 30th day of April, 1928, the defendants in open court note an appeal from the foregoing decree to the Court of Appeals of the District of Columbia, and the same is hereby allowed; and the mandatory portion of said decree is hereby stayed,
28 pending appeal, until the further order of this court.

JENNINGS BAILEY, *Justice.*

O. K. as to form:
O. H. GRAVES,
Atty. for Defts.

Assignment of errors

Filed July 5, 1928

* * * * * * *

The defendants, Hubert Work, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, assign the following as errors of the Supreme Court of the District of Columbia in the above-entitled cause, in the overruling of defendant's motion to dismiss and in the entering of its final decree awarding plaintiff a writ of injunction herein, to wit:

1. The court erred in overruling the motion of the defendants to dismiss the bill of complaint.

2. The court erred in restraining and enjoining the defendants, and each of them, their successors in office, and all persons claiming to act under their authority and control from issuing a patent to a tract of unsurveyed public land known as Whaler Island, located in the harbor of Crescent City, California.

3. The court erred in ordering and decreeing that the defendants and each of them shall give full legal force and effect to plaintiff's selection of said Whaler Island, excluding from consideration in disposing thereof the act of Congress of March 4, 1927.

4. The court erred in failing to find and hold that because of the act of Congress of March 4, 1927, Private, No. 530,
29 69th Congress, second session, the Secretary of the Interior had no discretion as to whom a patent to Whaler Island should issue and that only the ministerial act of issuing patent in accordance with the direction thereof remained for his performance.

5. The Court erred in failing to find and hold that the effect of the act of Congress of March 4, 1927, Private No. 530, 69th Congress, Second Session, was to divest the Secretary of any power to determine whether or not the land was open to entry by Lyders, or to determine any other question relative thereto as a basis for issuing a patent.

6. The Court erred in rendering its judgment in favor of the plaintiff and against the defendants.

7. The Court erred in failing to find and hold that plaintiff is possessed of an adequate civil remedy.

E. O. PATTERSON,
Solicitor Department of the Interior,
O. H. GRAVES,
Assistant to the Solicitor,
Attorneys for Defendants.

Designation of Record

Filed July 5, 1928

* * * * * * *

The Clerk of the Court will please prepare a transcript of the record in the above-entitled cause and include therein the following:

1. Bill of complaint with exhibits.
2. Motion to dismiss bill of complaint.
30 3. Final decree awarding injunction.
4. Asignment of errors.
5. This designation.

E. O. PATTERSON,
Solicitor, Department of the Interior,
O. H. GRAVES,
Assistant to Solicitor,
Attorneys for Defendants.

O. K.:
C. F. R. OGILBY,
Attorney for Plaintiff.

Service of a copy of above designation acknowledged this 30th day of June, 1928.

C. F. R. OGILBY,
Attorney for Plaintiff.

31 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 30, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48087 in equity, wherein Eric Lyders is plaintiff and Hubert Work, as Secretary of the Interior, and William Spry, as Commissioner of the General Land Office, are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10th day of July, 1928.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

[Indorsement on cover:] District of Columbia Supreme Court. No. 4783. Hubert Work as Secretary &c., et al., appellants, vs. Eric Lyders. Court of Appeals, District of Columbia. Filed July 10, 1928. Henry W. Hodges, Clerk.

○

AUG - 9 1928

No. 4783

In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1928

HUBERT WORK, AS SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, AS COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLANTS

v.

ERIC LYDERS, APPELLEE

BRIEF OF APPELLANTS

E. O. PATTERSON,
Solicitor, Interior Department.
O. H. GRAVES,
Assistant to the Solicitor.

U. S. GOVERNMENT PRINTING OFFICE: 1928

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In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1928

No. 4783

HUBERT WORK, AS SECRETARY OF THE INTERIOR, AND William Spry, as Commissioner of the General Land Office, appellants

v.

ERIC LYDERS, APPELLEE

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

The land involved is unsurveyed, unoccupied, nonmineral public land of the United States, consisting of about 3½ acres, known as Whaler Island, in the Pacific Ocean, off Crescent City, Del Norte County, California.

January 6, 1927: Lyders filed Valentine scrip in the local land office and selected Whaler Island thereunder.

January 23, 1927: President's withdrawal order No. 4573 issued, withdrawing Island from settlement, sale, location, entry, or other form of appropriation, subject to valid existing rights pending classification, and in aid of legislation.

February 12, 1927: President's withdrawal order No. 4582, withdrawing Island under act of June 25, 1910 (36 Stat. 847), as amended by act of August 24, 1912 (37 Stat. 497), in aid of legislation and in connection with improvement of harbor at Crescent City, California.

March 4, 1927: Act of Congress, Private, No. 530, 69th Congress (S. 5385), enacted as follows:

> That the Secretary of the Interior is hereby authorized to issue patent to the County of Del Norte, State of California, to Whaler Island, containing about three acres, in Crescent City Bay, Del Norte County, California, for purposes of a public wharf.
>
> SEC. 2. That the Secretary of the Interior is hereby directed to take such action as may be necessary to carry out the purposes of this Act.

May 17, 1927: Commissioner of the General Land Office rejected Lyders's selection.

October 3, 1927: Secretary affirmed General Land Office.

November 10, 1927: Rehearing denied.

March 15, 1928: Bill for injunction filed. (Tr. pp. 1 to 14.)

The purpose of this bill was to restrain and enjoin the Secretary of the Interior from complying with the act of Congress aforesaid, and from issuing a patent conveying the title of the United States to anyone other than the plaintiff, Lyders. The lower court rendered its decree on April 30, 1928 (Tr. p.

15), and thereby committed error as follows (Tr. p. 16):

1–6. In overruling motion to dismiss bill and in rendering judgment for plaintiff, Lyders.

2. In ordering a writ of injunction restraining and enjoining defendants from issuing a patent in compliance with the directions of Congress. (Private, No. 530, *supra.*)

3. In ordering a writ of injunction requiring defendants to give full legal force and effect to plaintiff's selection of Whaler Island excluding from consideration the act of Congress. (Private, No. 530, *supra.*)

4. In failing to recognize, find, and hold that by virtue of the directions of Congress (Private, No. 530, *supra*), the power of discretion generally reposed in the Secretary of the Interior had, in this instance, been divested by the act, leaving a mere ministerial act to be performed, in the exercise of no discretion.

5. In failing to recognize, find, and hold that the direction of Congress (Private, No. 530, *supra*) divested the Secretary of the Interior of all power to determine whether or not the tract involved was open to entry by Lyders, or to determine any other question relative thereto as a basis for issuing a patent.

7. In failing to find and hold plaintiff to be possessed of an adequate civil remedy, after compliance by defendants with the directions of Congress. (Private, No. 530, *supra.*)

These enumerated grounds of error may be condensed into one proposition for the purposes of this brief, as follows:

ARGUMENT

The act of Congress cited had the effect of divesting the Secretary of the Interior of all discretion, regarding the claim of Lyders, to Whaler Island.

In his bill of complaint, Lyders pleads that he has obtained, through his selection, an equitable title only to the tract (par. 10, Tr. p. 4). It follows that the legal title is in the United States. Such title will be passed to Del Norte County, California, by compliance with the directions of the act. Congress was fully advised of Lyders's selection when it passed the act. A reference to the files of the Committee on Public Lands and Surveys discloses the following printed report (to accompany S. 5385), caption omitted:

> The Committee on Public Lands and Surveys, to whom was referred the bill (S. 5385) authorizing the Secretary of the Interior to issue patent to the County of Del Norte, State of California, to Whaler Island, in Crescent City Bay, Del Norte County, Calif., for purposes of a public wharf, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.
>
> The facts are set forth in the following letters from the Secretary of the Interior and the Secretary of War, which are ap-

pended hereto, and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,
Washington, February 19, 1927.

Hon. ROBERT N. STANFIELD,
Chairman Committee on Public Lands and Surveys, United States Senate.

MY DEAR SENATOR STANFIELD: I am in receipt of your request dated January 26, 1927, for a report on S. 5385, authorizing the Secretary of the Interior to issue patent to the county of Del Norte, State of California, to Whaler Island in Crescent City Bay, Del Norte County, Calif., for purposes of a public wharf.

On January 6, 1927, Eric Lyders, 200 Bush Street, San Francisco, Calif., filed application for Whaler Island in the Pacific Ocean, situated about 1 mile southeast of the Crescent City lighthouse; also described by metes and bounds, and as containing 2.7 acres, approximately Sec. 33, T. 16 N., R. 1 W., Humboldt meridian, California.

The applicant surrendered an unused portion of special certificate E–86, issued to Thomas B. Valentine under the act of April 5, 1872 (17 Stat. 649). Notice for publication has been issued by the district land office. No patent can issue until the plat of survey has been filed, and no application for the survey of the land has been received in the General Land Office.

On February 8, 1927, J. J. McNamara, chairman of the Del Norte County Harbor Commission, on behalf of said commission,

filed a protest against the allowance of the selection by Lyders for Whaler Island, alleging that said island is a part of the improvement proposed for the harbor and that stone therefrom was available and needed in connection with such improvements. This protest has not been reached for consideration.

By Executive order of January 28, 1927, the island was withdrawn from disposal subject to prior valid existing rights, if any, under the provisions of the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), in aid of legislation.

By Executive order of February 12, 1927, the island was again withdrawn from disposal in aid of legislation and in connection with the improvement of the harbor at Crescent City, Calif. The latter withdrawal was made to meet the request of the Secretary of War dated January 27, 1927, which was accompanied by a map of Crescent City Harbor published in connection with House Document 595, Sixty-ninth Congress, second session, showing the completed and projected harbor improvements under construction by the Corps of Engineers, United States Army.

In view of the possible need of this island for use in connection with the improvement of the harbor, I suggest a reference of the bill to the Secretary of War.

Very truly yours,

HUBERT WORK.

WAR DEPARTMENT,
Washington, February 25, 1927.

Hon. ROBERT N. STANFIELD,
Chairman Committee on Public Lands and Surveys, United States Senate, Washington, D. C.

DEAR SENATOR STANFIELD: I have the honor to reply to your letter of the 25th instant requesting report on Senate bill No. 5385, authorizing the Secretary of the Interior to issue patent to the county of Del Norte, State of California, to Whaler Island, in Crescent City Bay, Del Norte County, Calif., for purposes of a public wharf.

Whaler Island is located in Crescent City Harbor, about 2,300 feet from the mainland, and has a rocky area of approximately 5 acres. It is understood to be unsurveyed public land under the control of the Department of the Interior. The island is considered by local interests an appropriate site for municipally owned wharves and terminals and the bill authorizes its transfer to the county of Del Norte for public-wharf purposes. Such transfer is not objectionable from the standpoint of the work of harbor improvement in charge of this department, and I am aware of no reason why the bill should not receive favorable consideration.

Sincerely yours,

DWIGHT F. DAVIS,
Secretary of War.

Therefore, as appears in the bill of complaint and exhibits, Congress had considered harbor im-

provements which involved this island. Act July 18, 1918 (40 Stat. 904, 910). See also Act January 21, 1927 (44 Stat. 1010, 1014). It appears that in pursuance of further contemplated legislation the President had issued two withdrawal orders covering Whaler Island. These facts are recalled merely because they indicate the trend of the Congressional mind when the Act in question was passed.

OFFICIAL ACTION INTERRUPTED

Congress not only had created the office of Secretary of the Interior but it had established his general duties. Those involving the disposition of the public domain required, generally, that he exercise his judgment and discretion, among other things, on the subject of what constitutes public land, its nature and character, when it shall be surveyed, when opened to public settlement, and when so opened whether or not a scrip selection thereof shall be given force and effect.

> It may be laid down as a general rule that *in the absence of some specific provision to the contrary in respect to any particular grant of land*, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior.

Catholic Bishop v. *Gibbon* (158 U. S. 155, 167).

He was about to act when Congress forbade him to proceed, and directed him to issue a patent to

Del Norte County. It was a specific provision to the contrary as to the particular tract.

Congress has the power, even after a claimant does everything incumbent upon him to do in furtherance of his claim or right until nothing remains but the ministerial act of the Secretary of the Interior to issue a patent in his favor, to divert the title to another.

> *Levy* v. *Stockslager,* Comr. (129 U. S. 470).
>
> *United States* v. *Rowell* (243 U. S. 464.)

A refusal to perform would have subjected him to proceedings on the part of Del Norte County for a writ of mandamus to compel a consistent compliance with the directions of the Act.

> *Todd* v. *Gongwer* (37 App. D. C. 555).
>
> *Fisher* v. *Grand Rapids T. Co.* (37 App. D. C. 436).

Such action by Congress must necessarily under the circumstances have been intended to limit the scope of the power of the Secretary of the Interior, and leave him with no other prerogative than ministerial compliance. The effect of compliance—i. e., delivery of patent to Del Norte County—need not be analyzed for any purpose here involved, for whatever its effect may be, Congress alone is responsible, and will no doubt be willing to assume and bear the burden thereof, if any. With the equitable title in one individual, and the legal title in another, it seems inevitable

that through some means they will ultimately be merged. By its action Congress—i. e., the United States of America—desires to retain no title or interest in the land. It desires to convey whatever right it has to Del Norte County. A condition apparently is intended when the intercession of the courts may be invoked to do full justice to whoever may be damaged, if anyone has been; but whether or not damage has occurred, it can not be laid at the door of the Department of the Interior. The defendant officials want to perform their official duty. In the light of conditions and legislation may they pass upon and select their path? Or has it been pointed out for them in the act by a power they must obey?

Even if we were to assume for the sake of argument that the contention of plaintiff is well grounded, to the extent that Lyders has acquired sufficient rights in Whaler Island to demand the exercise of discretion and judgment by the Secretary of the Interior, and that his official power has not been reduced by Congress to a mere ministerial act, then that discretion is broad enough to permit a decision by him which involves a comparison of the right of Lyders under applicable statutes, with the right of Del Norte County under the Act. He could then in the exercise thereof—as in effect he has done—determine in favor of Del Norte County and issue a patent to it. Until such final action is taken, in any event—i. e., based

either on the mere ministerial duty herein asserted or the discretional duty suggested above—the court may not interfere. When so taken all title passes from the United States, and Equity Courts become empowered to adjust inequities, if any, resulting therefrom.

In re Emblen (161 U. S. 52).
Emblen v. *Lincoln Land Co.* (184 U. S. 660).

THE ACT OF CONGRESS

This proceeding being one against the Secretary of the Interior as distinguished from the United States of America, the question of the legality or constitutionality of the act can not be considered. The action is one of a personal nature against the officers named. Its purpose is to compel or restrain official action. It has nothing to do with issues involving the Government. An issue such as the constitutionality of an act of Congress affects and involves governmental rights and makes indispensable the presence of the United States in the court where it is tried. A proceeding to obtain a writ of injunction for the direction of official action is not an action in equity for all purposes, but an extraordinary proceeding which can not be perverted to serve the purpose of an ordinary suit (*United States ex rel. Todd* v. *Gongwer, supra*), and is analogous to an action for mandamus (*McKenzie* v. *Fisher,* 40 App. D. C. 74). Only a question of official action may be considered.

If the court may not consider general issues such as the constitutionality of an act of Congress, much less may the officer, in order to defeat specific directions from a superior power, declare the direction *ultra vires* and disregard it. It is fundamental that a specific direction to perform a certain act supersedes a general rule of procedure. If the Congressional mandate is unconstitutional and void, it follows that a proper court, with proper parties before it, will correct any improper condition resulting therefrom. While an executive officer of the United States may construe the language of a statute to ascertain his duty thereunder (*Work* v. *Rives,* 267 U. S. 175; *Work* v. *Crimora,* App. D. C., 16 Fed. 2d 537), no precedent can be found permitting the officer to pass upon the constitutionality or validity of the statute directing his action. Courts of equity determine constitutional questions in actions involving the particular statute under consideration, with all proper parties present in court; but in the absence of consent or waiver upon the part of the United States to be sued, when an indispensable party to the action, the courts obtain no jurisdiction.

Naganab v. *Hitchcock* (202 U. S. 473).
United States v. *Lee* (106 U. S. 196).
Oregon v. *Hitchcock* (202 U. S. 60).
Goldberg v. *Daniels* (231 U. S. 218).
Ferris v. *Wilbur*, Sec'y Navy (p. 8 U. S. Daily, July 26, 1928, #2692 C. C. A. 4th Circuit, not yet officially reported.)

If, therefore, inequity results from official compliance with specific directions from Congress, such inequity may become the subject of a suit between the parties involved, and the court may determine the damage, if any, the validity or invalidity, constitutionality or unconstitutionality of the statute under which official action was performed, but it will never interfere with final action by the Secretary of the Interior in public land matters.

Johnson v. *Towsley* (13 Wall. 72).
Marquez v. *Frisbie* (101 U. S. 473).
Brown v. *Hitchcock* (173 U. S. 473).

To quote from the act in controversy:

> The Secretary of the Interior is hereby authorized to issue patent to the County of Del Norte.

The use of the word "authorized" in the act is equivalent to "directed." A special power is thereby conferred, a power tantamount to a special duty. (*Martin Wolfe,* 49 L. D. 627.) In section 2 he is "hereby directed to take such action as may be necessary"—notwithstanding full congressional knowledge of the fact of Lyders's application and scrip filing—"to carry out the purposes of this act." The clear purpose of Congress was to vest the legal title, or whatever title the United States then may have possessed, in Del Norte County, to accomplish which a survey and the execution of a patent describing the land is all that remained to be done. There is no discretion contained in such

language; the arrest of discretion is obviously intended; at least no alternative is apparent.

If Congress has acted injudiciously or without right, which is neither affirmed nor denied, the Secretary of the Interior can not sit in judgment upon it, and its action can neither be attacked nor determined collaterally in a proceeding having for its sole purpose the coercion of official action.

ADEQUATE REMEDY

Whether the patent directed by the act to be issued will pass any degree of title does not concern the defendants. If, as contended by plaintiff, he is now vested with a right to receive a clear title to the tract because of his scrip selection, that contention, if true, suggests its own answer—that no title will pass by virtue of a patent to Del Norte County. In such case, therefore, plaintiff is possessed of the entirely adequate civil remedy of having Del Norte County, after its receipt of patent, declared to be a trustee in his favor. The issuance of a patent in compliance with the Congressional direction of the act puts Lyders to no more trouble than he has assumed here in attempting to enforce official action in his favor, but in utter disregard of specific law. At any rate, the local courts of California will then be in a position to determine who is entitled to the island—Lyders or Del Norte County—and the United States will be entirely unconcerned over the result.

CONCLUSION

The act of Congress directs a clear ministerial duty by the defendants. Whether it avails or not; whether it is of benefit to Del Norte County; against the interest of Lyders or in his favor; whether or not it creates an unusual situation, is all beyond their official consideration. They may not reason why; they may not even hesitate to philosophize a la Hamlet, "To act or not to act?" They must act. If injury or wrong follows, it is at the hands of Congress, and a remedy exists; yet they must act.

The direction of Congress is the act of the United States. This suit, nominally against its agents, is in effect one against the United States. The case falls squarely within the rule announced in the case of Ferris, Trustee, *v.* Wilbur, Secretary of the Navy, supra.

The perception of the defendants of their official duty under the act seems in accord with the fundamental principles governing official action. The lower Court, in such view, was in error in awarding the writ, and should be reversed and the cause remanded with directions to dismiss.

E. O. PATTERSON,
Solicitor Interior Department.
O. H. GRAVES,
Assistant to the Solicitor.

○

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
SEP 17 1928

FOR MR. CHIEF JUSTICE MARTIN.

Henry W. Hodges
Clerk

Court of Appeals, District of Columbia

APRIL TERM, 1928

No. 4783

ROY O. WEST, SECRETARY OF THE INTERIOR, AND WILLIAM SPRY, COMMISSIONER OF THE GENERAL LAND OFFICE, *Appellants*,

vs.

ERIC LYDERS, *Appellee*.

BRIEF ON BEHALF OF APPELLEE

J. MORRILL CHAMBERLIN,
C. F. R. OGILBY
Attorneys for Eric Lyders, Appellee.

PEELLE, OGILBY & LESH,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Court of Appeals, District of Columbia

April Term, 1928

No. 4783

Roy O. West, Secretary of the Interior, and William Spry, Commissioner of the General Land Office, *Appellants*,

vs.

Eric Lyders, *Appellee.*

BRIEF ON BEHALF OF APPELLEE

This case was heard below on the bill of complaint and motion to dismiss, and comes to this Court upon the appeal of the defendants below, the Secretary of the Interior, and the Commissioner of the General Land Office, from a decree restraining and enjoining said defendants from cancelling or rejecting plaintiff's location and selection of a tract of land known as Whaler Island, in the Harbor of Crescent City, California, and from issuing a patent thereto to the County of Del Norte, California, and requiring said defendants, in giving full legal force and effect to plaintiff's selection thereof, to exclude from consideration certain executive orders withdrawing the Is-

land from location, settlement, etc., and also a certain Act of Congress which authorized the Secretary of the Interior to patent the Island to Del Norte County; both the executive withdrawals and the Act of Congress being subsequent in time to the filing of the plaintiff's selection and location. (R. p. 15.)

While most concise and condensed, the statement of the case in appellants' brief is deemed by counsel to cover the situation sufficiently in its essential facts, except that it might be noted that while the Island was unsurveyed before the filing of the bill of complaint herein, it has since been surveyed. And, further, the brief of the appellants makes no reference to the allegations of the bill to the effect that the plaintiff had done all things necessary, in accordance with the rules and regulations of the Land Department, to entitle him to a patent to Whaler Island under his location thereof by Valentine scrip, before the date of either the executive withdrawals or the Act of Congress. (R. p. 4.)

ARGUMENT

Counsel for the appellants condense their enumerated grounds of error into one proposition, which they state as follows: "The Act of Congress cited had the effect of divesting the Secretary of the Interior of all discretion, regarding the claim of Lyders, to Whaler Island."

The appellants' position might perhaps be better stated in two propositions, first, that the Act of March 4, 1927, was mandatory upon the Secretary of the Interior, and, second, that Lyders cannot be heard to question the constitutionality of that Act in this proceeding.

In similar manner, condensing our reply, we say:

Lyders' rights to Whaler Island having become vested, by his filing upon and location of Whaler Island with Valentine scrip, those vested rights could not be divested or disturbed, either by the Executive, by the Land Department or by Congress, in the manner here attempted.

Lyders' rights to Whaler Island became vested when he located the same with his Valentine scrip, (the land being open to such location), and when he did everything required of such a locator to be done, pursuant to the rules and regulations of the Land Department. This is in effect admitted in the motion to dismiss, and that Lyders' rights were vested before either executive withdrawal and before the passage of the Act of Congress of March 4, 1927, is nowhere denied in the appellants' brief. To contend that his rights were not so vested, would be to run counter to a long line of decisions, both of the Land Department itself and of the Courts.

The position of the appellants is that the passage of the Act of Congress, "authorizing" the Secretary of the Interior to patent Whaler Island to the County of Del Norte, deprived the Secretary of all discretion and was mandatory upon him. The position of appellee is that Congress in such a manner could not destroy vested rights, and take from one person his vested property rights and give them to another, and that the Secretary could not comply with the Act of Congress, "authorizing" him to patent the Island to Del Norte County, unless he should first find, upon an examination of Lyders' selection, unaffected by a consideration of the executive withdrawals and the Act of Congress, that Lyders' selection must fail. Then, and then only was he authorized to patent the

Island to Del Norte County, the Act in question providing merely a new channel for or method of disposing of the Island, not in existence before.

For the purposes of this case, it is practically of no importance whether Congress "authorized" or "directed" the Secretary to patent Whaler Island to Del Norte County. Congress has used both expressions in numerous Acts, and while as a general rule it might be contended that the use of the word "authorized" implies a discretionary power on the part of the Secretary, whereas the use of the word "directed" eliminates all thought of a discretionary power, and even though the word "authorize" has frequently been construed to mean "direct," it is obvious that neither an executive officer nor Congress itself has the power to destroy rights that have once vested, and it is unthinkable that such could be the law. Obviously, Congress can confiscate or take private property for a public use, but only by due process of law, and upon payment of just compensation therefor.

In their brief for the appellants, at Pages 4, 5, 6, and 7, counsel set forth the Senate Report of the bill which subsequently became the Act of March 4, 1927, "authorizing" the Secretary to patent Whaler Island to Del Norte County, for the purpose of showing that "Congress was fully advised of Lyders' selection when it passed the Act." But nowhere do we find any reference to the House of Representatives Report on the same bill, which latter report is found, in part, at pages 11 and 12 of the Transcript of the Record in this case. It is therein stated "The private claimant should not succeed in his application unless lawful reasons require it. The Courts are open to protect the lawful right, if any, of the applicant, notwithstanding this action of Congress." Not only did Con-

gress have full knowledge of Lyders' claim but it made no attempt to pass upon it, and left the determination thereof to the Courts. It seems clear that Congress used the words "authorized" and "protect" advisedly to indicate to Lyders that the way was open to him to protect his vested rights from invasion by a resort to the Courts, rather than that he should be remitted to prolonged litigation to recover those rights after they had been taken away from him and given to another.

It is respectfully submitted that neither the case of Levey vs. Stockslager (129 U. S. 470), nor United States vs. Rowell (243 U. S. 464), sustain the proposition so boldly enunciated by the appellants that "Congress has the power, even after a claimant does everything incumbent upon him to do in furtherance of his claim or right until nothing remains but the ministerial act of the Secretary of the Interior to issue a patent in his favor, to divert the title to another." (Appellants' brief, p. 9.)

The case of Levey vs. Stockslager was an action in mandamus to compel the Commissioner of the General Land Office to issue certain certificates contemplated by the Act of March 2, 1867, giving the heirs of one Bouligny the right to scrip certificates in lieu of Louisiana lands in possession of the United States. The next succeeding Congress, by Joint Resolution passed March 30, 1867, before anything was done by the Land Department, suspended the operation of the Act of March 2, 1867. The Supreme Court held that there was no grant, and that no vested rights had attached; in the opinion in that case, on Page 478, we find the following:

> "Inasmuch as nothing had been done by the officers of the Land Department under the Act of March 2, 1867, and no certificates had been made out, and the whole matter still remained executory, no vested right had attached at the time of the approval of the joint resolution. Therefore, that resolution did not deprive the widow and children of any property, or right of property, in violation of the Constitution. The transaction was merely the ordinary one of a direction by statute to a public officer to perform a certain duty, and a subsequent direction to him by statute, before he had performed that duty or had entered upon its performance, not to perform it."

In other words, if the Act of March 2, 1867, had been carried out by the officers of the Land Department and certificates had been made out, and the widow had acquired a vested right prior to the approval of the Joint Resolution, then the Joint Resolution would have been in violation of the Constitution as an attempt to deprive her of her property. Levey vs. Stockslager, therefore, is authority for our contention that the passage by Congress of the Act of March 4, 1927, was unauthorized, ineffectual to destroy Lyders' vested rights, and a violation of the Fifth Amendment to the Constitution of the United States.

In the Rowell case, Rowell claimed under a special act, "authorizing and directing" the Secretary of the Interior to issue a patent to Rowell for a specific tract of Indian land, not public land, which had theretofore been set apart and reserved for school purposes for the Indians, and still was reserved at the date of the Court's decision. Congress passed a later Act repealing outright the earlier Act authorizing and directing the issuance of patent to Rowell, on the ground that the value of the tract had been misrepresented

and that deception had been practiced upon Congress to secure the passage of the directory Act. Obviously, Rowell's rights could not have been vested if they had been acquired through fraud, and Congress of course had the power to pass the repealing Act, particularly so since Rowell was an adopted member of the Indian tribe, and Congress, as guardian for the Indians, could change or modify its exercise of control over the property of the Indians before its direction had been carried into effect.

Accordingly, we say that neither of the cases cited by the appellants can support the proposition that Congress, after vested rights have attached, can divest or destroy those rights and pass title to another.

The cases of Todd vs. Gongwer, and Fisher vs. Grand Rapids Timber Company, both in 37 App. D. C., at Pages 555 and 436, respectively, are not in point. Both were cases where mandamus was sought to compel certain action by departmental officials. Here an entirely different situation is presented in that it is sought to restrain departmental officials from giving effect to an unconstitutional Act of Congress—unconstitutional because it deprives a citizen of his property without just compensation and without due process of law. It is unthinkable that a citizen must stand idly by while an executive officer seeks to destroy his vested property rights by carrying out an Act of Congress violating the Fifth Amendment to the Constitution, but that is exactly what the Secretary has said here that he was going to do.

Citing the cases of In re Emblen (161 U. S. 52), and Emblen vs. Lincoln Land Co. (184 U. S. 660), the appellants say that the courts may not interfere until title passes from the United States, when equity courts become empowered to adjust inequities, if any exist.

The question presented in the Lyders' case was not before the Supreme Court in either of the Emblen cases. In the first Emblen case, the Secretary had already issued a patent, pursuant to the "direction" of an Act of Congress, and of course it was held that jurisdiction had passed out of the Land Department, and that Emblen's only remedy was to resort to a court of equity to have the patentee declared a trustee in his favor. In Lyders' case, if Lyders had sat by and waited for patent to issue to Del Norte County, he would be exactly in the situation in which Emblen found himself. After the first decision against him, Emblen went into the equity court of the Federal District containing the land involved, to have the patentee (or his assigns) declared a trustee in his favor, but the Supreme Court held that Emblen had acquired no vested right with which Congress had interferred by directing the issuance of patent to the original patentee.

Lyders has no adequate remedy at law, nor should he be required to defer action to protect his vested rights until after patent has issued to Del Norte County, because to the Secretary of the Interior is committed the jurisdiction of determining whether Lyders' selection or location is valid and complies with the statutes, rules and regulations under which made. The courts of this District have often protected those who have sought relief from unauthorized attempts of executive officers to destroy vested rights. In the case of Payne vs. Central Pacific Railway Company (255 U. S. 228), the Supreme Court of the United States affirmed the decree of this court which, reversing a decree of the Supreme Court of the District of Columbia, directed that an injunction issue to restrain the Land Department from cancelling a selection of

indemnity lands under a railroad land grant because of the subsequent inclusion of the land involved in a power site withdrawal, on the ground that nothing remained to be done by the railroad grantee to fulfill the conditions of the grant and perfect its right to a patent. "The rule applicable in such a situation," says Mr. Justice Van Devanter in the opinion of the Court in that case, "is that 'a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof.' " Citing Wirth vs. Branson (98 U. S. 118) and other cases. Counsel for appellants impliedly admit in their brief that Lyders is the equitable owner of Whaler Island, and why? Because nothing remained to be done by him to perfect his right to a patent.

In the case of Simmons vs. Wagner (101 U. S. 260), the learned Chief Justice Waite announced the following rule:

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty. Barney vs. Dolph, (97 U. S. 652), Stark vs. Starrs (6 Wall. 402."

And earlier, in the case of Wilcox vs. Jackson (13 Pet. 498, at Page 513), the Supreme Court laid down the following rule: "But we go farther, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or

proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it."

Thirty-six years later, in its opinion in the case of Leavenworth, etc. R. R. Co. vs. U. S., (92 U. S. 733) the same Court quoted that language with approval, and added "It may be said that it was not necessary for the court in deciding the case to pass upon this question; but, however this may be, the principle asserted is sound and reasonable, and we adopt it as a rule of construction."

Can it be said that the principle is any different here? We think not. Lyders, acting under the authority of the Act of Congress of April 5, 1872 (17 Stat. 649) granting scrip rights to Thomas B. Valentine and his legal representatives, and by virtue of his Valentine scrip, "appropriated" Whaler Island, and became entitled to a patent thereto. It thereupon, from that moment, became severed from the mass of public lands, and no subsequent law, proclamation or sale could be construed to embrace it or operate upon it.

The rule laid down in the Payne vs. Central Pacific case above-mentioned, has been followed by this court and the Supreme Court of the United States in a number of other cases, and the rule is now so well settled that further citation of authority seems entirely unnecessary. It may be said that in the Central Pacific case and other like cases the attempted invasion of vested rights was only by executive action, while here it is necessary to go one step farther, because it is not an executive officer but Congress which is attempting to invade vested rights. But can Congress, any more than an executive officer, deprive a person of property without due process of law or without giving

just compensation therefor? We respectfully submit that it cannot; and that Congress is not "the United States" as asserted by counsel on page 10 of their brief, but only one of three co-ordinate, co-extensive branches of the Government, all of which bow to the Constitution of the United States, the supreme law of the land.

Counsel for the appellants assert that since this proceeding is one against the Secretary of the Interior as distinguished from the United States of America, the question of the constitutionality of the Act of March 4, 1927, cannot be considered (appellants' brief, page 11); they further make the astounding statement that an issue such as the constitutionality of an Act of Congress affects and involves governmental rights and makes indispensable the presence of the United States in the court where it is tried. Appellants further declare, on page 12 of their brief, that no precedent can be found to permit an executive officer of the United States to pass upon the constitutionality or validity of the statutes directing his action.

Since the case of Marbury vs. Madison (1 Cr. 137), it has been uniformly held that it is not only the right but the duty of the judiciary to pass upon and declare void statutes in conflict with the organic law, otherwise constitutional limitations would be vainly imposed. Ours is a Government of laws, not of men. Furthermore, no case has ever held that because a consideration of the constitutionality of an Act of Congress affects and involves governmental rights, the presence of the United States is indispensable in the court where such a question is tried.

The contention was made in the Central Pacific case, as it has been made in countless other cases, that

the suit was in effect one against the United States and therefore could not proceed without its consent. Mr. Justice Van Devanter said of that contention:

> "We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think the suit is one to restrain the appellants from canceling a valid indemnity selection through a mistaken conception of their authority, and thereby casting a cloud on the plaintiff's title." Citing Ballinger vs. United States, (216 U. S. 240), and other cases.

This suit is one to restrain the appellants from cancelling a valid scrip selection through a mistaken conception of their authority.

Of a similar contention made in the case of Daniels vs. Wagner (237 U. S. 547), Mr. Chief Justice White said:

> "Various mixed contentions of law and fact are stated * * * some of them we think too obviously devoid of merit to require anything but statement. For instance, the contention that because a patent of the United States is involved, therefore the United States is a necessary party."

True it is that in neither of these cases was the constitutionality of an Act of Congress drawn into question, but in the 10th Volume of the Opinions of the Attorney General, page 61 (see also U. S. Code Annotated, Part 2 under Constitution, at page 434), will be found the following:

> "There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In

> such cases, there is no room for construction, no ground for argument; and in all such cases, not only the judiciary department, but every department, and indeed every private man who is required to act upon the subject-matter, must determine for himself what the law of the land, as applicable to the case in hand, really is. He must obey the law, the whole law; and if the conflict between the Constitution and the Act of Congress—the higher and the lower law—be plain and unquestionable, he must, of necessity, disregard the one or the other. He cannot disregard the Constitution, for that is the supreme law; and therefore he must obey the Constitution even though, in doing so, he must disregard a statute. Rights of Settlers under Pre-exemption Laws (1861) 10 Op. Atty. Gen. 61."

So here, since the Act of March 4, 1927, *supra,* if carried into effect, would obviously deprive the appellee, Lyders, of his property, namely the vested rights acquired by his location of his Valentine scrip on Whaler Island, without just compensation, and without due process of law, the Secretary of the Interior must disregard the Act of Congress and obey the Constitution, which is the supreme law of the land.

The appellants cite, on page 11 of their brief, the case of McKenzie vs. Fisher (40 App. D. C. 74). In that case a soldier's original entry was held void, so that he had no "additional right" to assign, and the bill seeking to coerce the Secretary into approving a soldier's additional entry was properly dismissed. The following is found in the opinion of Mr. Chief Justice Shepard in that case:

> "The object of the bill is to coerce the Secretary of the Interior in the exercise of certain official duties in respect of the administration of the pub-

lic lands, and in that respect is somewhat correlative to the action of mandamus. Noble v. Union River Logging Co., (147 U. S. 165-172 etc.).

"The writ of mandamus lies to compel the performance of a plain official duty requiring no exercise of discretion; and likewise, when such a duty is threatened to be violated, or a vested right is threatened to be destroyed by an act clearly beyond the official authority, the aggrieved party, without adequate remedy at law, is entitled to a writ of injunction to restrain such action. Garfield v. U. S. (211 U. S. 249, 261); Ballinger v. U. S. (216 U. S. 240-8)."

So here, the vested rights of Lyders are threatened to be destroyed by an act clearly beyond the legislative authority, and Lyders, without adequate remedy at law, is entitled to a writ of injunction to restrain such action.

Obviously, as held in the cases cited at the bottom of page 12 of appellants' brief, when the United States is an indispensable party to the action, and has not consented to appear or be sued, the courts obtain no jurisdiction of a case involving the constitutionality of a statute. In the case of Naganab vs. Hitchcock, and Oregon vs. Hitchcock, in 202 U. S., pages 473 and 60, respectively, the United States still retained title to the lands involved and claimed a beneficial interest therein. Of course the United States was a necessary party. Here the appellants in their brief disclaim any interest in Whaler Island on the part of the United States because, they say, Congress has directed, as they put it, that title to Whaler Island be conveyed to the County of Del Norte, California. In Goldberg vs. Daniels (231 U. S. 218), the United States still owned the cruiser which was the subject

of the suit, and of course the United States was a necessary party. In the case of the United States vs. Lee (106 U. S. 196), Lee sought to recover the old Arlington estate, taken from him by tax sale and detained by force, a part for military purposes and part for a cemetery, now known as Arlington National Cemetery; it was claimed by the Government that the executive branch of the Government has absolute immunity from judicial inquiry. Mr. Justice Miller in a lengthy and learned opinion in that case stated, *inter alia,* at page 220, as follows:

> "It is not pretended, as the case now stands, that the President had any lawful authority to do this nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive *and the legislative,* to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation." (Italics by Counsel).

and again, on page 221:

> "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government with-

out any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

We respectfully submit that the case of Ferris vs. Wilbur, Secretary of the Navy, decided by the Circuit Court of Appeals for the Fourth Circuit, appearing on page 8 of the United States Daily of July 26, 1928, but not yet officially reported, is more helpful to the appellee than to the appellants by whom it is cited. In that case, the land involved was neither "authorized" nor "directed" to be patented to others, but was to be used for purposes of the United States, to-wit, the storing of explosives, etc. In the course of the opinion it is said that the suit "is manifestly, then, not a suit to restrain unauthorized action by a government official *or action based upon an unconstitutional statute,* but a suit to restrain action in which the official is exercising valid governmental authority by virtue of his office." (Italics by Counsel). We here assert, with all the emphasis possible, that the Lyders' case *is* a suit in which it is sought to restrain action based upon an unconstitutional statute. Again, a little later in the opinion appears the following:

"There is an obvious distinction between such a case and one where defendant is sued as an officer of the Government and it is sought to restrain him from action taken in the exercise of a discretion reposed by Congress in the Executive Department. Where the act complained of is not

> authorized by statute *or where the statute authorizing it is void because in conflict with some provision of the Constitution,* the person attempting it may be restrained in a proper case notwithstanding his claim that he is acting in his official capacity. In such case he is acting not within the law but outside it, his act is not the act of the Government, and the law affords him no protection for what he is doing or is about to do." (Italics by Counsel).

And again, later in the opinion, the Circuit Court of Appeals made the following observation:

> "It is true that Congress in exercising the powers vested in it by the Constitution, and the Executive in exercising the discretion reposed in it by Congress, must have regard for the rights of private persons as guaranteed by the Constitution. Private property cannot be taken for public use without just compensation, nor can persons be deprived of property without due process of law."

The Circuit Court of Appeals in the Ferris case quoted from the case of Philadelphia Company vs. Stimson (223 U. S. 605), wherein the Supreme Court of the United States affirmed a decision of this Court reported in 33 App. D. C. at page 338 et seq. That case was a bill brought against the Secretary of War to set aside certain harbor lines, insofar as they encroached upon the plaintiff's land, and to restrain the Secretary of War from causing threatened criminal proceedings to be instituted against the plaintiff for reclamation and occupation of land outside of the prescribed lands. The contention was made in that case that the proceeding was virtually a suit against the United States. This court, in reply to that contention, stated as follows:

"An unconstitutional statute, in the execution or by the authority of which an officer of the United States would violate the rights and privileges of a citizen, affords no justification for his acts; and he cannot shield himself from the consequences of such acts on the ground that his action is taken solely in the interest, and on behalf of, the United States. The United States are not necessary parties to an action to recover possession of property so unlawfully taken and held, or to restrain trespasses that would work irreparable injury." Citing United States vs. Lee, *supra,* and other Supreme Court cases.

In affirming this Court in that case, the Supreme Court of the United States, through Mr. Justice Hughes, used the following language:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Citing United States vs. Lee, *supra,* and other cases). And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (Citing Osborn vs. Bank of the United States, 9 Wheat. 738 and other Supreme Court and State cases). And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred. Noble vs. Union River Logging R. Co. (147 U. S. 165), and American School vs. McAnnulty. (187 U. S. 94.)

> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

It is respectfully submitted that the case of Philadelphia Co. vs. Stimson is a full and complete answer to the astonishing proposition propounded by the learned counsel for the appellants.

In the cases of Johnson vs. Towsley (13 Wall. 72), Marquez vs. Frisbie (101 U. S. 473), and Brown vs. Hitchcock (173 U. S. 473), it was held that while the courts have no right to interfere with the Land Department while title to the land involved is still in the United States and the matter is pending before the Land Department, the courts will give relief when the Land Department, by misconstruction of the law, takes from a party that to which he has acquired a legal right. In the last of the three cases named, Mr. Justice Brewer, speaking for the Supreme Court, said *inter alia:*

> "We do not mean to say that cases may not arise in which a party is justified in coming into the courts of the District to assert his rights as against a proceeding in the Land Department, or when the Department refuses to act at all. U. S. vs. Schurz, (102 U. S. 378), and Noble vs. Union River Logging Railroad Co. (147 U. S. 165), are illustrative of these exceptional cases."

In conclusion, we refer to the case of Edward F. Smith et al. (51 L. D. 454), in which the Secretary of the Interior himself held, as stated in the syllabus of his opinion, as follows:

> "The location of Valentine scrip upon unsurveyed public land in conformity with the law and departmental regulations is such an appropriation of the land as can not be defeated by a subsequent reclamation withdrawal, notwithstanding that the selection had not been adjusted to an official survey, and the selector can not thereafter be deprived of his rights thus acquired except in the manner prescribed by the reclamation act."

If Lyders' location of Whaler Island, in conformity with the law and departmental regulations, is such an appropriation of the land as cannot be defeated by an executive withdrawal, as held by the Secretary, the same reasons apply for holding that Lyders cannot be deprived of his vested rights by the Act of Congress of March 4, 1927, Private No. 530, 69th Congress, which violated the Fifth Amendment to the Constitution of the United States.

It is respectfully submitted that the decree below was correct and should be affirmed.

J. Morrill Chamberlin,
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Peelle, Ogilby & Lesh,
Of Counsel.

September 17, 1928.